INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	2
(1) The Charges and the evidence	3
(2) The Arrest and pre-trial motions	5
Argument	8
Conclusion	11

CITATIONS

Case:	
United States v. *Carll*, 105 U.S. 611	10
Statute:	
Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 535, 29 U.S.C. 501(c)	2

225-367—66

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 266

ANGELO COLELLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 360 F. 2d 792.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1966. On May 13, 1966, Mr. Justice Fortas extended the time for filing a petition for a writ of certiorari to and including June 20, 1966, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was entitled to a hearing to determine whether papers taken from him at the time of a valid arrest were evidentiary in nature.

2. Whether the trial court's instructions to the jury were proper.

3. Whether the indictment sufficiently alleged the element of intent.

4. Whether petitioner's privilege against self-incrimination was violated by the trial court's refusal to permit counsel to defer his opening statement until after the presentation of the government's evidence.

STATUTE INVOLVED

Section 501(c) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 535; 29 U.S.C. 501(c), provides:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

STATEMENT

After a trial by jury in the United States District Court for the District of Puerto Rico, petitioner, a field representative and organizer for the International Union of Electrical, Radio, and Machine Workers ("IUE"), A.F.L.-C.I.O., was convicted on all counts of a six-count indictment charging violations of Section 501(c) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 535; 29 U.S.C. 501(c) (R. 686). The imposition of sentence was suspended, and petitioner was placed on probation for a period of three years (R. 696). The court of appeals affirmed.

(1) THE CHARGES AND THE EVIDENCE

The indictment charged that petitioner, on assignment in Puerto Rico, on various occasions between March and June 1961, "embezzled, stole and unlawfully and willfully abstracted and converted to his own use" funds of IUE (totaling over $2,300) by obtaining reimbursement on false vouchers submitted to the union for hotel or car rental expenses which he "well knew" were not incurred or were in excess of true amounts incurred (R. 5–12). The government proved by documentary evidence (including vouchers, receipts and checks), produced by the comptroller of IUE in compliance with a subpoena *duces tecum* (R. 63), that petitioner had received and requested reimbursement for each of the "expenses" described in the indictment (see R. 83–143). The testimony of personnel of various hotels, and hotel records, established either that petitioner had not been registered at the time he represented (R. 182–186), or that he had been billed, and paid for, less charges than those indicated on fabricated bills or receipts (R. 175–180; 187–205). A representative of a Puerto Rican business concern, from which petitioner had purportedly rented automobiles, testified that the firm was in the motion picture business, that it did not rent automobiles, and that the "receipt" which petitioner had submitted to the union was the firm's inventory cue card (R. 209–211).

Petitioner admitted that he had inflated and fabricated his bills in Puerto Rico, but explained that his purpose was to secure reimbursement for amounts he had spent for entertainment and other expenses incidental to union negotiations and organizational cam-

paigns (R. 523–533, 537–543), payments to pickets or strikers for needs not covered by strike relief (R. 533–537), and the cost of bringing his family to Puerto Rico, which had been authorized by Mr. Al Hartnett, IUE's then secretary-treasurer (R. 544–545). He said the practice of submitting false receipts was one of long standing established by Hartnett, who had explained that certain expenditures—chiefly liquor—could not be shown on expense vouchers (R. 517). Petitioner produced witnesses who testified that they had falsified receipts in accord with instructions from Hartnett (R. 305–309, 320–322, 323–325, 334–339, 348–350, 352–354, 360–361), and other witnesses who testified as to petitioner's many activities and accomplishments in Puerto Rico, as well as to having seen him disburse cash for entertainment and other purposes (R. 362–375, 416–419, 448–451, 483–486, 491–493, 500–503). Petitioner admitted that he had kept no record whatever of his actual expenses or of any true bills or receipts issued to him (R. 547).

In rebuttal, the government produced Mr. Hartnett, who denied having at any time instructed petitioner or anyone else to falsify vouchers for reimbursement purposes (R. 612–613, 616, 617). He explained how relief strike funds were administered and denied that he ever told petitioner to make additional cash payments to strikers or pickets (R. 613–614). He did not recall having discussed petitioner's family with him at the time in question and did not instruct him to falsify vouchers to cover the cost of the family's trip to Puerto Rico (R. 615–616). He never told petitioner

that there was a need to hide the true cost of valid negotiations or organizational campaigns (R. 619).

(2) THE ARREST AND PRE-TRIAL MOTIONS

Petitioner was arrested on February 14, 1963, pursuant to an arrest warrant. The warrant was based upon the complaint of an F.B.I. agent alleging that, on the basis of investigation, he believed that petitioner had embezzled funds of the IUE by falsifying statements concerning his expenses at the Villa Parguera Hotel (R. 5–8). Petitioner was indicted on February 20, 1963, on counts involving fabricated expenses at the Villa Parguera and three other conerns (R. 1, 8–12).

On March 28, 1963, petitioner filed five motions, among which was a motion to suppress as evidence property alleged to have been unlawfully seized without a warrant at the time of petitioner's arrest (R. 1, 14–15). The property was described, in substance, as copies of correspondence between IUE's president (James B. Carey) and various union representatives "concerning charges made by Al Hartnett and Main and Company," other letters addressed to the president and to petitioner from various representatives, a letter from Main and Company to IUE's comptroller with an enclosure bearing a list of 36 names, and a yellow pad containing petitioner's personal notes (R. 14–15).[1]

[1] The opinion of the court below describes this property as including "intra-union correspondence in which the [union] President, acting on an accounting report, called on various members (including defendant) to explain or justify their expense accounts and their replies, together with mimeographed

In response to the suppression motion, the government filed the sworn statements of two F.B.I. agents who had arrested petitioner (R. 19–21, 22–24). They said that they entered the hotel room shared by petitioner and another after displaying their credentials and being permitted to enter. Petitioner was advised of the arrest warrant, placed under arrest and briefly searched for weapons. Petitioner identified an open suitcase on a nearby couch, a large yellow manila envelope and a yellow legal size tablet resting on top of clothing in the case, as his. He said the tablet bore his handwriting and that the envelope contained his personal papers. One of the agents looked at the tablet and the contents of the envelope and advised petitioner that the two items were being taken incident to his arrest. No search was made of the room. The entire arrest consumed not more than from 5 to 7 minutes. The trial court thereafter denied the motions made by petitioner, including the motion to suppress (R. 24–25).

On December 11, 1964, petitioner filed a supplementary motion requesting return of the property taken from him at the time of arrest and suppression of any information based upon it on the ground that it had been seized pursuant to a defective warrant of arrest and without a search warrant (R. 29–30). On

---

reports of meetings on this investigation and newspaper clippings" (Pet. App. 35). The notes of petitioner related to his "conversations with one Mendez and one Ugarte, employees of the IUE office in Puerto Rico, which reported them as saying that they had followed Hartnett's instructions (presumably as to falsifying vouchers) through fear of losing their jobs" (*ibid.*).

the same day he filed a supplemental motion to dismiss the indictment alleging that among the "personal papers" illegally seized at the time of his arrest was one referring in part to one Mendez, that Mendez had refused to answer questions of federal agents before the seizure, but that Mendez had thereafter testified before the grand jury as a result of the illegal seizure (R. 31–32). The court denied both motions on December 14, 1964, immediately prior to trial, noting that it had previously ruled on the question of illegal search and seizure (R. 34–35).

The papers taken from petitioner at the time of his arrest were not introduced by the government at trial. The documents were produced by an F.B.I. agent in response to a subpoena *duces tecum* issued by the defense (R. 512). They were offered by the defense as exhibits and rejected (R. 554). Mendez was called as a witness by the defense, but he left the stand without testifying after the court sustained an objection to defense counsel's first question—an inquiry whether the witness had testified before the grand jury (R. 513–515).

The court of appeals held that both the complaint and the warrant were valid. It did not reach the question of whether any papers seized were "instrumentalities or fruits of a crime" (Pet. App. 35) because it found that there had been no showing that the papers were used, directly or indirectly, against petitioner. It found that the indictment could not have been tainted by the testimony of Mendez, noting that the government had previously been aware of this witness from sources independent of petitioner's notes.

The court observed that, in any event, there was obviously substantial and competent evidence from other sources before the grand jury.

ARGUMENT

1. The court of appeals properly rejected petitioner's claim that he had been prejudiced by an allegedly unlawful search and seizure. The documents taken from him at the time of his arrest were of minimal significance, and there was no basis for belief that they had tainted either the evidence offered at trial or that which was presented to the grand jury. The union correspondence bore no relation to the government's proof and it was, in any event, available to government counsel from other sources. In addition, it is apparent from the record that a long investigation had preceded petitioner's arrest; it is most unlikely, therefore, that government agents were directed to either of the two individuals named in the notes—both of whom were obvious potential sources of information since they were employees of IUE in Puerto Rico—by anything contained in the notes.

Petitioner's present contention that he should have been afforded a hearing to determine whether any evidence used by the government was obtained as a result of an impermissible seizure of personal papers is particularly unsound in view of the fact that a substantially different ground for suppression was urged in the district court. Petitioner did not contend in the district court that the property taken was not subject to seizure at all; he argued rather that it

had been seized "pursuant to a Warrant of Arrest which was defective on its face, against his will and without a search warrant * * *" (R. 30; see R. 15). Not having been requested to determine whether the documents, or any portion of them, were seizable at all, the district judge did not commit error in failing to hold a hearing on whether such documents were sources of the government's proof. The circumstances of the arrest and seizure were not in dispute, and the district court correctly held that the arrest was lawful and that the search was incident to that arrest.

2. Petitioner's argument that the trial court committed reversible error in refusing to instruct as to what constituted a reimbursable expenditure for "union purposes" (Pet. 21–23) is unsound. The only instruction requested was that "any expenditures the Defendant made which were authorized by his Union superiors are to be treated as expenditures for a union purpose" (see R. 662–663). This instruction was properly rejected since, as the district judge noted, "that would be permitting any union officer to violate the law" (R. 663). It would, in effect, permit a union employee to embezzle money if his "superior" authorized or condoned such a practice.

The specific issue was whether petitioner, in filing the admittedly false vouchers, with or without advice from a superior, was stealing, embezzling, or converting union funds to his own use. The instructions of the court, in reciting the charges of each count in the words of the statute (R. 673–677), and in defining conversion (R. 677) and specific intent (R. 672, 677–

678), adequately advised the jury in this regard. Moreover, the court painstakingly presented the theory of the defense. The jury was told that if it had a reasonable doubt whether the money involved in any count was used by the defendant for his own benefit or for the benefit of another, it was required to acquit the defendant as to that count (R. 679). It was told that the fact that the defendant's requests for reimbursements were false in certain respects did not, itself, constitute commission of the crimes charged; that petitioner was entitled to claim reimbursement for any money spent on union purposes (R. 680); and that to find petitioner guilty the jury had to be convinced beyond a reasonable doubt that each request for payment was submitted by petitioner "with the criminal intent to obtain money which had not been spent for a union purpose and [that petitioner] did thereafter use that money for a non-union purpose" (R. 679). The jury was thus made fully aware that petitioner could not be found guilty if they believed his claim that money obtained by the false vouchers had been used for the union's benefit.

3. This case does not involve the question whether an indictment must allege criminal intent (Pet. 18–21). The court below properly held that the indictment adequately alleged intent under the principle enunciated in *United States* v. *Carll*, 105 U.S. 611. The court of appeals said (see Pet. App. 37):

> * * * Paraphrased, each count alleges embezzlement, theft, unlawful and willful abstraction, unlawful and willful conversion to defendant's own use, all by means of an expense voucher falsified by defendant who received money

> therefrom when he "well knew" expenses had, in whole or in part, not been incurred. * * * One could not innocently embezzle or steal. One could not unlawfully and willfully abstract or convert to his own use money belonging to the union, on the basis of a false voucher well knowing it to be false, pocket the proceeds, and still be innocent.

4. There is no substance to the contention that petitioner's privilege against self-incrimination was violated by the trial court's "insistence" (Pet. 2) that his counsel make his opening statement before the presentation of the government's evidence. The record shows that when the court answered "No" to a defense request for a deferment of opening statement, defense counsel proceeded immediately to make such a statement without voicing any objection (R. 39). The statement afforded the government no assistance in its case in chief. No serious attempt was made, until after petitioner had taken the stand, to meet petitioner's defense that the false statements had been authorized.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

JULY 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966